

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On October 24, 2013 appellant, then a 33-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on October 21, 2013 she sustained pain in her middle and low back when she was struck by a forklift while in the performance of duty. She stopped work on October 24, 2013. OWCP accepted the claim for a herniated disc at L4-5 and L5-S1 with radiculopathy. It paid appellant wage-loss compensation on the supplemental rolls, effective December 6, 2013, and on the periodic rolls, effective August 24, 2014.

In a report dated September 17, 2015, Dr. James A. Maultsby, a Board-certified orthopedic surgeon and OWCP referral physician, opined that appellant had no residuals of her accepted October 21, 2013 employment injury. He found that she could work full time lifting up to 70 pounds. In a December 21, 2015 addendum report, Dr. Maultsby advised that appellant's work restrictions were related to her "lack of motivation and recent lack of activity" rather than the accepted employment injury.

On March 14, 2016 Dr. Pamela L. Hord, Board-certified in family medicine, diagnosed desiccation of intervertebral discs and disc bulging with radiculopathy at L5-S1. She found that appellant could resume work with restrictions "starting on limited hours and working towards a full-time day if tolerated."

OWCP determined that a conflict in the medical opinion evidence existed between Dr. Maultsby and Dr. Hord, regarding the extent of appellant's employment-related disability. It referred her to Dr. Robert W. Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated April 17, 2017, Dr. Elkins diagnosed mild-to-moderate symptom magnification, disc protrusions at L4-5 and L5-S1, degenerative disc disease at L5-S1 as seen on a 2013 magnetic resonance imaging (MRI) scan, and a small herniated disc at L5-S1 as seen on a 2015 MRI scan. He found that appellant had continued restrictions from her employment injury, but could work full time lifting up to 50 pounds occasionally and 35 pounds frequently. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Elkins found that she could work eight hours per day at a medium level with restrictions on pushing and pulling up to 50 pounds for four hours per day, lifting up to 30 pounds for four hours per day, squatting, kneeling, twisting, bending, and operating a motor vehicle at work up to one hour per day, and no climbing.

On June 1, 2018 the employing establishment offered appellant a modified, limited-duty position as a mail processing clerk. The physical requirements of the position included lifting mail weighing up to 30 pounds intermittently for two to four hours per day, sorting mail weighing up to 30 pounds intermittently for two to four hours per day, loading mail weighing up to 30 pounds

intermittently for two to four hours per day, and walking and standing intermittently for one to two hours per day.

On July 23, 2018 OWCP advised appellant that the offered position was suitable and afforded her 30 days to accept the position and report for duty or provide a written explanation of her reasons for refusal.

In a report dated August 16, 2018, Dr. Pamela L. Harris, an osteopath Board-certified in family medicine, found that appellant could not lift more than 10 pounds or walk, stand, or sit for more than 15 to 20 minutes.

Appellant's representative asserted that her attending physician had provided a new report and that management had indicated that the job offer would remain within the physical restrictions provided by her physician. He maintained that the employing establishment had not provided a proper job offer.

On October 12, 2018 OWCP advised appellant that her reasons for refusing the position were not deemed justified and afforded her an additional 15 days to accept the job.

In a memorandum of telephone call (Form CA-110) dated October 26, 2018, appellant asserted that she was "upset that OWCP will cut off her pay" and that her attending physician had found that she was unable to return to work. She indicated that it had taken 12 days for her to receive the October 12, 2018 letter from OWCP.

The employing establishment, on October 31, 2018, confirmed that the offered position remained available.

By decision dated October 31, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, pursuant to 5 U.S.C. § 8106(c)(2), due to her refusal of suitable work.

In a report of telephone call dated December 10, 2018, appellant advised that she had accepted the offered position.

On December 12, 2018 appellant filed a claim for compensation (Form CA-7) for disability beginning November 1, 2018.

On December 31, 2018 appellant, through her representative, requested continued compensation. In a statement dated December 27, 2018, she maintained that on October 29, 2018 OWCP had provided her 10 extra days to accept the position. Appellant related that she had provided evidence on August 21, 2018 showing that she had accepted the offered position. She contended that the job offer was not modified and that the date of the offer was July 13, 2018 rather than June 1, 2018.

On February 19, 2019 appellant accepted a modified position as a mail processing clerk at the employing establishment.

In a duty status report (Form CA-17) dated February 25, 2019, Dr. Harris found that appellant was disabled from employment.³

On August 28, 2019 Dr. Arthur W. Wardell, a Board-certified orthopedic surgeon, discussed appellant's history of an October 21, 2013 employment injury. He diagnosed post-traumatic lumbar spondylosis, a lumbar disc injury, right and left lumbar facet arthropathy, and lumbar disc displacement without myelopathy. Dr. Wardell indicated that appellant was off work from October 24, 2013 to February 2019 and from February 2019 to the present, noting that she had performed light duty for three days in February 2019.⁴

An electromyogram obtained on September 17, 2019 revealed moderate left L5-S1 radiculopathy and mild right L5-S1 radiculopathy. An MRI scan of even date showed a central disc protrusion at L5-S1 contacting the S1 nerve root with mild compression on the left and a small disc protrusion at L4-5 with an annular tear.

On November 5, 2019 appellant, through her representative, requested reconsideration. In an October 29, 2019 statement, her representative contended that she had not received the June 1, 2018 job offer and, thus, had not refused the offer. She advised that the employing establishment had provided appellant with a July 13, 2018 job offer, which she accepted on July 30, 2018; however, the employing establishment told her that there was no work available. Appellant's representative asserted that on November 2018 she received the June 1, 2018 job offer and accepted the position, but that there was no work available. Appellant accepted the position on February 19, 2019 and worked from February 20 to 23, 2019, when she stopped due to increased pain.

With her reconsideration request, appellant submitted a copy of a July 12, 2018 job offer with her signed acceptance on July 30, 2018 pending approval from Dr. Harris. A manager with the employing establishment signed the offer on July 12, 2018 and indicated that the position was available on July 21, 2018. Appellant also submitted a July 13, 2018 letter from the employing establishment confirming that she had received a copy of the letter and requesting that she respond no later than July 18, 2018 for a scheduled return to work on July 21, 2018.

Appellant also submitted a copy of the June 1, 2018 job offer, which she signed as accepted on November 5, 2018 pending approval of her attending physician. Additionally, appellant submitted progress reports from Dr. Wardell describing his treatment and finding that she was disabled from employment.

By decision dated October 2, 2020, OWCP denied appellant's request for reconsideration as it was untimely and failed to demonstrate clear evidence of error.

³ Dr. Harris continued to submit CA-17 form reports, finding a appellant disabled from employment.

⁴ Dr. Wardell provided progress reports dated October 2 and November 25, 2019, and January 6 and April 1, 2020. Appellant also underwent a function capacity evaluation in November 2019 finding that she could perform sedentary employment.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁵ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁶ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.⁹ OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.¹⁰ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹² The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹³

⁵ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁶ 20 C.F.R. § 10.607(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

⁸ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

¹⁰ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (September 2020).

¹¹ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹² *S.C.*, Docket No. 18-0126 (issued May 14, 2016).

¹³ *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

OWCP procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face demonstrates that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁴ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁵

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁶ As appellant's request for reconsideration was not received until November 5, 2019, more than one year after the issuance of OWCP's last merit decision dated October 31, 2018, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its October 31, 2018 decision.¹⁷

The Board finds that OWCP has not demonstrated clear evidence of error. The underlying issue is whether OWCP properly terminated appellant's compensation, commencing October 31, 2018, due to her refusal of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). The Board finds that the arguments and evidence submitted by appellant in support of her request for reconsideration did not raise a substantial question as to the correctness of the termination of her compensation.¹⁸

On reconsideration appellant's representative contended that she had not received the June 1, 2018 job offer. She indicated that appellant had accepted a July 13, 2018 job offer, but was subsequently told there was no work available. Appellant's representative maintained that she had accepted a modified position on February 19, 2019, but stopped work on February 23, 2019 due to pain. She submitted a job offer from the employing establishment dated July 13, 2018, noting a return-to-work date on July 21, 2018, which appellant signed as accepted on July 30, 2018 pending approval from her physician. There is no evidence, however, that she returned to work at the employing establishment prior to OWCP's termination of her compensation on October 31, 2018 for refusing suitable work. Appellant, thus, has not established clear evidence of error.¹⁹

¹⁴ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a) (September 2020).

¹⁵ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁶ 20 C.F.R. § 10.607(a).

¹⁷ *Id.* at § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

¹⁸ *See S.D.*, Docket No. 17-1450 (issued January 8, 2018); *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁹ *S.D.*, *id.*

Subsequent to its termination decision, OWCP received Form CA-17 reports from Dr. Harris, diagnostic studies, and progress reports from Dr. Wardell, who also found that she was disabled from work. The newly submitted medical evidence does not demonstrate clear error on the part of OWCP in its suitable work determination. As discussed, clear evidence of error is intended to represent a difficult standard.²⁰ The claimant must present evidence which on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.²¹ The medical evidence fails to manifest on its face that OWCP committed an error in terminating appellant's wage-loss compensation and entitlement to a schedule award for refusing suitable work and, thus, is insufficient to demonstrate clear evidence of error.

On appeal appellant's representative argues that she timely requested reconsideration on October 29, 2019. As noted, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.²² Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in iFECS.²³ OWCP did not receive appellant's request for reconsideration of its October 31, 2018 decision until November 5, 2019. Appellant's representative further maintains that she did not deny a job offer. As noted, however, she has not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, appellant has not established clear evidence of error.²⁴

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

²⁰ A.A., Docket No. 19-1219 (issued December 10, 2019); J.F., Docket No. 18-1802 (issued May 20, 2019); J.D., Docket No. 16-1767 (issued January 12, 2017); *Dean D. Beets*, 43 ECAB 1153 (1992).

²¹ *Id.* See also *Leona N. Travis*, 43 ECAB 227 (1999).

²² See *R.S.*, Docket No. 19-0312 (issued June 18, 2019); *G.Q.*, Docket No. 18-1697 (issued March 21, 2019).

²³ *Supra* note 7. See *L.W.*, Docket No. 19-1367 (issued December 19, 2019).

²⁴ See *M.B.*, Docket No. 17-1505 (issued January 9, 2018).

ORDER

IT IS HEREBY ORDERED THAT the October 2, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board